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Supreme Court of the United States.

OCTOBER TERM, 1965.

No. 1270

NANTUCKET EXPRESS LINES, INC., ISLAND STEAMSHIP LINES, INC., AND JOSEPH T. GELINAS, *Petitioners,*

v.

WOODS HOLE, MARTHA'S VINEYARD & NANTUCKET STEAMSHIP AUTHORITY, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

To the Honorable the Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts by rescript dated February 3, 1966, in the case there entitled *Nantucket Express Lines, Inc. & others* v. *Woods Hole, Martha's Vineyard & Nantucket Steamship Authority.*

Opinion Below.

An opinion was filed by the Supreme Judicial Court of Massachusetts on February 3, 1966. It is reported in 1966 Massachusetts Advance Sheets, p. 139. It is printed in

the Appendix, p. 7, *infra*. It affirmed a decree of the Superior Court denying petitioners' right to be heard (R. 1).

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

The writ is sought to review the final decree rendered by the highest Court of the Commonwealth of Massachusetts on the vitality of a restraining order under an annulled statute on the grounds of its being repugnant to the Constitution.

Questions Presented.

1. Did the denial of the State Court to hold a hearing by reason of new matter affecting the validity of a restraining order springing from a statute apparently valid at the time the order was issued, thereafter annulled by legislative mandate and thereafter so ruled by the State Court, violate right of the petitioners, or any one thereof, to due process under the Fourteenth Amendment to the Constitution?

2. Did refusal of the State Court to hold a hearing when confronted with new evidence supporting petitioner Nantucket Express Lines, Inc.'s engagement in interstate commerce violate art. I, § 8 of the United States Constitution?

Constitutional Provisions Involved.

The Constitutional provisions involved are:

1. Amendment XIV, § 1: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

2. Article I, § 8, cl. 3: "The Congress shall have Power . . . To regulate Commerce . . ."

Statement of the Case.

In 1959 a restraining order was issued and decree entered in the Superior Court, Bristol County, Commonwealth of Massachusetts, in a suit brought by the New Bedford, Woods Hole, Martha's Vineyard and Nantucket Steamship Authority against Nantucket Express Lines, Inc., Island Steamship Lines, Inc., Island Service Co., Joseph T. Gelinas and Carl A. Dahlberg. That decree enjoined the five respondents (including three who are petitioners here) and their officers, servants and agents from operating the vessel "Martha's Vineyard" between the mainland of the Commonwealth and Nantucket, so long as any bonds issued by the Steamship Authority pursuant to St. 1948, c. 544, remain unpaid.

The petitioner in the 1959 action (New Bedford, Woods Hole, Martha's Vineyard & Nantucket Steamship Authority) was abolished by the statute creating the respondent here, Woods Hole, Martha's Vineyard & Nantucket Steamship Authority. By virtue of section 16, c. 701, St. 1960, St. 1948, c. 544, was annulled[1] and thereafter so affirmed.[2]

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[1] "SECTION 16. *Abolition of New Bedford, Woods Hole, Martha's Vineyard and Nantucket Steamship Authority and transfer of its assets and liabilities to Woods Hole, Martha's Vineyard and Nantucket Steamship Authority.*—Said New Bedford, Woods Hole, Martha's Vineyard and Nantucket Steamship Authority is hereby abolished; . . ."

[2] Abolishment was affirmed by the Supreme Judicial Court of Massachusetts in the case of *Barnstable* v. *Woods Hole, Martha's Vineyard and Nantucket Steamship Authority*, 343 Mass. 674, at p. 680.

In January, 1965, the three petitioners here, respondents in the 1959 action, requested leave to file a bill to review the decree entered in that action. Motion for leave to file petition was denied.

Reasons for Granting the Writ.

The petitioners here seek review because of new matter arising after entry of the 1959 restraining order:

1. The moving party in the 1959 action has been abolished and the law annulled:

> ". . . when laws 'expire . . . they cease to be the law in relation to the past, as well as the future, and can no longer be enforced . . .'"
>
> *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 333.

2. Petitioner Nantucket Express Lines, Inc., subsequent to said order and as said order may have been modified, has become engaged in interstate commerce, and this old restraining order and refusal to hear the question (new matter) are repugnant to the Constitution.

The State Court erred by refusal to hold a hearing upon petitioners' bill of review after having found in a previous ruling that the governing statute under which the restraining order was issued was annulled.

The petitioners here are entitled, as a matter of law, to an earlier established ruling, such ruling having occurred since the entry of the restraining order and decree. *Wishnewsky* v. *Saugus*, 325 Mass. 191, 196.

The doctrine of res judicata does not apply here, where the law under attack has expired.

Significantly, there was no hearing upon the merits.

The law under which the restraining order was issued in 1959 was declared annulled as of January 1, 1961, the effective date of the new statute. If the entry of a modified order in 1962 estops two of the original parties to review because they sought modification in 1962 (R. 3), surely the remaining parties affected by the restraining order, who did not join in the 1962 modification, ought not to be deprived of their right of due process.

The State Court erred in ruling that the petitioner Island Steamship Lines, Inc., not a party to the 1962 modification, is bound by estoppel, all rights to a hearing having been denied. Relevancy of this question was not heard and, obviously, cannot be implied.

The historic definition of the "law of the land" by Mr. Webster in argument in the case of *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518, is pertinent:

> "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society."

The State Court erred in ignoring the rule established one hundred and forty years ago in the case of *Gibbons* v. *Ogden*, 9 Wheat. 1, 196 (the power of Congress to regulate interstate commerce as well as foreign commerce) and by denying the fundamental rights of the petitioners to be heard on the question of interstate commerce.

In *International Paper Co.* v. *Commonwealth of Massachusetts*, 246 U.S. 135, 141-142, the Court ruled:

> "2. Under the commerce clause exclusive power to regulate interstate commerce rests in Congress, and

a state statute which either directly or by its necessary operation burdens such commerce is invalid, regardless of the purpose with which it was enacted."

The relevancy of interstate commerce was not an issue in 1962.

Conclusion.

For the reasons stated above, petitioners respectfully suggest that a writ of certiorari ought to issue to review the decision of the Supreme Court of Massachusetts.

Respectfully submitted,

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Appendix.

Opinion of the Supreme Judicial Court.

NANTUCKET EXPRESS LINES, INC., & others *vs.* WOODS HOLE, MARTHA'S VINEYARD AND NANTUCKET STEAMSHIP AUTHORITY.

Bristol. December 10, 1965.—February 3, 1966.

Present: WILKINS, C.J., SPALDING, WHITTEMORE, KIRK, & SPIEGEL, JJ.

Res Judicata. Equity Jurisdiction, Bill of review. *Equity Pleading and Practice,* Decree, Proceeding for review.

Case heard in the Superior Court by *Dewing,* J.

SPALDING, J. In July, 1959, a final decree was entered in the Superior Court in a suit brought by the New Bedford, Woods Hole, Martha's Vineyard and Nantucket Steamship Authority (the Authority) against Nantucket Express Lines, Inc., Island Steamship Lines, Inc., Island Service Co., Joseph T. Gelinas and Carl A. Dahlberg. That decree enjoined the five defendants (petitioners here) and their officers, servants and agents from operating the vessel "Martha's Vineyard" between the mainland of the Commonwealth and Nantucket, so long as any bonds issued by the Authority pursuant to St. 1948, c. 544, remained unpaid.

In January, 1965, three of the defendants [1] in the 1959 suit petitioned for leave to file a bill to review the decree entered in that suit. Leave was denied and the petitioners have appealed. [2]

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[1] Island Service Co. and Carl A. Dahlberg did not join in the petition.

[2] Although the denial was not embodied in a decree, it was in substance a decree and will be so treated. See *Bressler* v. *Averbuck,* 322 Mass. 139, 143, and cases cited.

The 1959 decree was entered in accordance with St. 1948, c. 544, § 6, which provided in part: "While any bonds issued by the Authority remain unpaid, no person shall operate a vessel of more than one hundred tons gross tonnage to carry by water passengers or freight between the mainland of the commonwealth and the islands of Martha's Vineyard and Nantucket, and the Authority shall be entitled to receive injunctive relief against such operation." By St. 1960, c. 701, the Authority was abolished, the Woods Hole, Martha's Vineyard and Nantucket Steamship Authority (the new Authority) was created, and the new Authority was vested with all the assets of the Authority and assumed all its indebtedness and liabilities. Section 5 of c. 701 provided that "no person shall operate a vessel of more than one hundred gross tons for the carriage of passengers, vehicles or freight for hire by water between the mainland of the Commonwealth and the island of Martha's Vineyard or the island of Nantucket or between said islands unless licensed or permitted in writing so to do by the [new] Authority. The superior court shall have jurisdiction, on a petition in equity by the [new] Authority, to enjoin any such operation."

The bill of review which the petitioners sought leave to file in the present proceeding asserted that St. 1960, c. 701, was new matter arising after the entry of the decree in 1959 and requiring the vacating of the decree. A bill of review is the appropriate proceeding by which to seek reversal or modification of a final decree in equity by reason of new matter arising after the entry of the decree. *Boston & Maine R.R.* v. *Greenfield,* 253 Mass. 391, 397. *Brooks* v. *National Shawmut Bank,* 323 Mass. 677, 684. A change in the applicable law may be such new matter. *Sawyer* v. *Davis,* 136 Mass. 239, 246-247.

Thus, if there were no more to the case than this, we would have to consider whether the changes in the govern-

ing law made by St. 1960, c. 701, require any changes in the 1959 decree. That question, however, need not be answered since a reconsideration of the 1959 decree is barred by a prior adjudication in a proceeding between the same parties or their privies involving the same issues.

In May, 1962, Nantucket Express Lines, Inc. and Joseph T. Gelinas petitioned for leave to file a bill to review the 1959 decree.[3] The 1962 bill of review set forth *the abolition of the Authority by St. 1960, c. 701,* and the creation of the new Authority. It concluded: "[A]s a result of said new matters and occurrences arising after the entry of . . . [the 1959 decree] the issues set forth in the . . . original petition . . . in equity have become moot, and . . . it would be inequitable and constitute a hardship upon your petitioners unless . . . [the 1959 decree] be vacated." A final decree was entered in the 1962 bill of review proceeding modifying the 1959 final decree in respects not here relevant.

Thus, in 1962 the new matter now relied upon by the petitioners was in existence. It was then relied upon as the basis for seeking review of the 1959 decree. A final decree was entered in the 1962 proceeding and the petitioners are bound by that adjudication "as to every issue that in fact was or in law might have been litigated." *Cleaveland* v. *Malden Sav. Bank,* 291 Mass. 295, 298. *Willett* v. *Webster,* 337 Mass. 98, 102. All that the pe-

[3] Island Steamship Lines, Inc. was not a party to the 1962 bill of review. At all relevant times, however, it was owned and controlled by Gelinas. Thus, it is "so identified in interest with a party to former litigation that . . . [it] represents precisely the same legal right in respect to the subject matter involved," *Jefferson Sch. of Social Science* v. *Subversive Activities Control Bd.,* 331 F. 2d 76, 83 (Ct. App. D.C.), and the doctrine of res judicata applies to it as a privy of a party to the former litigation. See *Hart Steel Co.* v. *Railroad Supply Co.,* 244 U.S. 294, 298; *Keystone Mining Co.* v. *Gray,* 120 F. 2d 1, 6–7 (3d Cir.).

titioners seek to accomplish by the present proceeding might have been litigated under the 1962 bill of review. That the decree was entered by consent does not make it any less conclusive. *C. A. Briggs Co.* v. *National Wafer Co.*, 215 Mass. 100, 109. *Fishman* v. *Alberts*, 321 Mass. 280, 281. A final decree entered in a bill of review is as much an adjudication for the purposes of the doctrine of res judicata as is any other final decree. See Restatement: Judgments, § 112, comment i. See also *Gordinier's Appeal*, 89 Pa. 528; *Frauenthal's Appeal*, 100 Pa. 290, 295-296.

Decree dismissing petition affirmed with costs of appeal.

Roger F. Turner for the petitioners.

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